Supreme Court, U.S.
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No. 99-268

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1999

KENNETH G. MIDDLETON,
Petitioner,

vs.

MICHAEL L. KEMNA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

I. Whether this Court should grant certiorari to consider whether the District Court erred in reviewing claims under the standard of review set out in the Anti-Terrorism and Effective Death Penalty Act in a case in which the initial *pro se* habeas petition was filed before the effective date of the act, even though the District Court found that all the petitioner's claims also failed under the pre-Anti-Terrorism and Effective Death Penalty Act standard? . . . . . .

II. Whether this Court should grant certiorari to review whether the District Court acted correctly in finding that the petitioner was not in custody when he made certain statements and performed certain acts that were later admitted in evidence? . . . . . .

III. Whether this Court should grant certiorari to determine if the District Court acted correctly in finding certain claims to be procedurally barred either because a state court allegedly reached the merits of some of the claims or because good cause and actual prejudice were demonstrated? . . . . . .

IV. Whether this Court should grant certiorari to review whether the court below erred in denying a certificate of appealability as opposed to denying a certificate of probable cause because the court below views the standards for granting these certificates in a case raised under 28 U.S.C. §2254 as identical and therefore the petitioner could have suffered no prejudice . . . . . .

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Statement of the Case

The Missouri Court of Appeals found following general facts concerning the crime of which the petitioner was convicted:

> The evidence presented to the jury, stated favorably to the verdict, showed that on February 12, 1990, Katherine Middleton was at work at AT & T in Lee's Summit, Missouri, when she received a phone call from her husband, the defendant, who complained of illness. She left work and drove home.
>
> Approximately twenty minutes later, at 1:52 p.m., the 9-1-1 dispatcher received a call from the defendant requesting an ambulance. The defendant told the dispatcher, "A gun just went off and hit my wife... [i]n the side of the head." Within three minutes, a second call was received by the 9-1-1 operator. The caller told the 9-1-1 operator, "There wasn't supposed to be anything in it. Oh God." While they conversed, police officer John Gale arrived at the Middleton residence located in Blue Springs, Missouri.

As Officer Gale arrived, the defendant came out of the house appearing "real frantic," which caused the officer to draw his gun. The defendant was yelling and asking where the paramedics were. When Officer Gale realized the defendant was unarmed, he holstered his gun and asked the defendant what had happened. The defendant did not answer, but instead kept yelling, "Where are the paramedics?"

It was a bright, sunny day but the blinds in the house, which were almost always open, were drawn and the inside of the house was dark. Upon entering the house, Officer Gale looked into the dining room and saw the victim, Mrs. Middleton, lying in a pool of blood on her right side. She had a bullet wound above her left eye with an exit wound on the right side of her head. He testified that it was apparent she had not been breathing for several minutes.

When Officer Gale returned to the defendant in the living room, he tried to determine what had happened.

He asked if his wife had committed suicide, and the defendant replied she had not. The defendant explained that he had been sick and had called his wife home from work. While he waited for her, he was cleaning his Smith & Wesson .357 Magnum. He explained that when his wife got home, she picked up the gun, started to walk to the other room, dropped the gun and it went off.

Officer Spartz and Sergeant Collier arrived about this time and observed the .357 Magnum lying on an ottoman. The defendant said he had picked it up and placed it there. One officer inspected the gun and found five shells and one empty cylinder. The firing pin was depressed on one of the shells, indicating it had been fired. The bullets were jacketed, hollow-point shells, designed to "mushroom back" or expand when they enter the target.

Because the defendant was acting "explosive," Officer Spartz hid the gun behind the television set. The defendant

appeared agitated, continuing to yell and flail his arms. This activity caused the officer to pat him down to make sure he did not have another weapon. Immediately following the pat down, the defendant acted surprised, became rigid, and screamed that he was going to be sick. He ran down the hallway to the bathroom. Officer Spartz followed him and saw that he was washing his hands in the sink. Both Spartz and Gale twice told the defendant to get his hands out from under the water. They finally had to pull him out. The officers did not see the defendant vomit or stand over the toilet. They did see him spit saliva into the sink.

The defendant used a hand towel to dry his hands. Officer Spartz took the defendant outside to the garage and tried to calm him down and asked him to explain exactly what happened. The defendant repeated what he had said before, except in more detail. He told the officer he had taken some pills that morning for an infection, and began sweating and feeling ill.

He called his wife to come home from work and when she arrived, she told him he looked ill and said she was going to call the doctor. She took the gun the defendant was cleaning and as she walked to the telephone, she dropped the weapon. The defendant explained that when the gun fell to the floor it went off in her face. At this point, the defendant threw up his hands and banged them against the garage door.

During the time the defendant was outside with Officer Spartz, Officer Gale looked for some indication that the defendant had been cleaning his gun. He found no evidence substantiating defendant's explanation, except for a towel upstairs. He later found a gun box and some brushes in the basement.

Paramedics Keebaugh and Wedlock arrived and determined the defendant was hyperventilating, complaining of chest pains, and his blood pressure was slightly elevated. They convinced the defendant to allow them to transport him

to the hospital for an examination. As the paramedics prepared to transport him, the defendant reached his hands into a flower planter and began rubbing his hands in the dirt. At some point after this and before the defendant was taken to the hospital, the police performed a paraffin test on his hands.

Officer Spartz rode in the ambulance with the defendant and again asked him "...to be clear as to what exactly had happened in the house." The defendant narrated the events up to the point where his wife was walking to the telephone. He abruptly stopped and closed his eyes in a manner described by the officer as "squinting" and appeared unconscious. This surprised the paramedic and caused him to perform some tests to determine defendant's medical condition. When the ambulance arrived at St. Mary's Hospital in Blue Springs, the defendant continued to appear unconscious.

Officer Spartz positioned himself at the

nurses' station and was able to observe the defendant in his room. When no one was in the room, the defendant would open his eyes and look around, but when someone came in, he would shut them. Eventually, he began to interact with hospital personnel. The police officer went into the room and the defendant agreed to resume telling the events that had taken place earlier that day. On this occasion, he described the death of his wife as follows. She came in and told him she was going to call the doctor and went to the telephone. He was sitting in the chair wiping his gun off when he got up to hand her the gun. He related that he was unsure whether he "fell back or what," but he next woke up on the floor. His wife was lying on the floor.

An autopsy showed that Mrs. Middleton was 5'6" and weighed 128 pounds, and had a single gunshot wound to the head, which the medical examiner testified was the cause of death. The entry point was above the left eye, 3 1/2" below the top of her head. The exit point was on the right side,

> 2 1/2" below the top of her head. There was a prominent area of powder stippling, i.e., small dots, present around the left side of her face over an area measuring 4 1/2" x 4".
>
> The medical examiner testified to multiple contusions on her upper chest, which were caused by a blunt trauma. The bruises were described by the examiner as consistent with someone of the defendant's size (6 feet tall, 200 pounds) "grabbing the woman by the blouse and pressing her against a wall."

State v. Middleton, 854 S.W.2d 504, 506-508 (Mo.App., W.D. 1993).

The Missouri Court of Appeals made the following specific findings concerning pretrial statements and silence by the petitioner.

> During the events that took place at the defendant's residence, as well as en route to and at the hospital, the defendant was never formally arrested, nor was he given his *Miranda* rights [footnote omitted]. In separate interviews at the house, only a few minutes apart, the defendant

gave two statements, which were factually similar were admitted into evidence. The defendant's actions and silence during the ambulance ride to the hospital were used against him, as were a third statement given at the hospital.

* * *

State v. Middleton, 854 S.W.2d at 509-10.

With respect to the defendant's assertion that when he ran into the front yard he was faced with a police officer with his gun drawn, the testimony described the defendant as being in a hysterical state. The testimony clearly explained that the officer readied his weapon for his own protection. Later events confirmed that it was not the intent of the officer to arrest the defendant. Once it became apparent that the defendant was not armed, the officer reholstered his weapon.

The officers arrived on the scene of a shooting where an individual had been killed and the survivor was in a highly agitated condition. It is

expected that they should exercise caution for their own safety. Patting-down the defendant, hiding the .357 Magnum behind the television, keeping him under observation by following him to the bathroom and accompanying him outside were actions designed to protect their own safety. Further, the officers were obligated to investigate the shooting, which included the preservation of evidence such as gunpowder residue which could be on the hands of the only survivor at the scene of a shooting.

The officer's written report that the defendant was in custody was a conclusionary statement. It was no more determinative or binding on the court's decision that defendant was in custody than if the report had said he was not in custody. The court had the discretion to give whatever weight, if any, it chose to that statement.

The defendant was never formally arrested, handcuffed, taken into custody, or restrained of his freedom to

> move at will within the house or at any other time following his second hospital stay. The police were at the residence as a result of the defendant's 9-1-1 call. With the exception of several temporary and minimal restraints, the defendant was free to move about without restraint. No one forced him to be transported to the hospital; for his own well-being, the paramedics suggested he go and he consented. There is no evidence of strong-arm tactics, deceptions or trickery to obtain incriminating statements. The police questions were straightforward. They simply asked the defendant, who was a primary source of information, to explain what occurred. Finally, the facts do not indicate a police-dominated atmosphere. Certainly, there were occasions when the defendant was restrained but these restraints were minimal, temporary and were necessary either for the officers' protection, concern for Mr. Middleton's safety or the preservation of evidence.

State v. Middleton, 854 S.W.2d at 510-511.

> These restraints, limited and temporary, did not amount to a restraint on the defendant's freedom of movement or coercive police activity to a degree that required the *Miranda* warning. The coercive aspects of a custodial interrogation were not present. No hold that at the time these statements were given, the defendant was neither formally arrested nor restrained of his freedom of movement of a degree associated with a formal arrest.
>
> Further, the activities at the house constituted an on-the-scene investigation.

Id.

> In the ambulance, the defendant was relating the events of the incident, when he closed his eyes and abruptly stopped his statement at the point where his wife had picked up his revolver and headed out of the room. The sudden unresponsiveness surprised the paramedic, and in accordance with standard practice, he conducted a series of tests. He rubbed the

defendant's sternum to obtain a response (the defendant flinched), pinched the defendant's arm (he flinched again), tried to insert a plastic tube into the defendant's mouth to create an oral airway (the defendant gagged and spit it back out), placed an ammonia capsule under the defendant's nose (he pursed his lips and blew the capsule across the ambulance), and finally, held the defendant's arm over his head and released it. If a person is unconscious, the hand will strike his face. The defendant twice moved his hand as it fell so that it struck the top of his head, rather than his face. The responses caused the paramedic to conclude that the defendant was feigning unconsciousness.

These were standard tests legitimately conducted to evaluate the defendant's medical condition. There was substantial evidence allowing the trial court to conclude that when the tests were administered by the paramedic, the defendant was not in custody, was not being questioned, and the paramedic

was not acting on behalf of the police officer. There is no evidence, except unbridled speculation, supporting defendant's theory that the tests were done in order for the officer to continue questioning the defendant. Defendant's pre-arrest silence is admissible as a tacit admission. *State v. Lawrence*, 569 S.W.2d 263, 265 (Mo.App. 1978).

The statement that defendant made at the hospital was in more detail than the previous two he had given. At the hospital, when the officer noticed that the defendant had begun to interact with hospital personnel, he went into his room. The defendant agreed to continue talking to him. After the preliminary details, the defendant stated, as related by the police officer. "And he had--he was sitting there in the chair, wiping his gun off, and he got up to hand her the gun. *He doesn't know if he fell back or what, but the next thing he knows, he woke up on the floor or he was on the floor and she was on the floor also*" (emphasis added).

> The fact that the questioning occurred at the hospital does not necessarily determine that there was custodial interrogation. *State v. Schnick*, 819 S.W.2d 330, 334 (Mo. banc 1991); *State v. Swingler*, 632 S.W.2d 267, 272 (Mo.App. 1982). When the interview took place, the defendant was not at the mercy of the officer nor was he deprived of his freedom of action to any degree by the police officer. All evidence and inferences were that the defendant could have terminated the interview at any time and directed the officer to leave. The coercive aspects of a custodial interrogation were not present. *Schnick*, 819 S.W.2d at 334. The hospital setting and the facts related to the officer's question did not transform itself into a custodial interrogation.

(Id. at 511-512).

Procedural History

The petitioner was convicted by a jury in the Circuit Court of Jackson County, Missouri in February 1991 of first degree murder and armed criminal action and

sentenced to concurrent terms of imprisonment of life without the possibility of probation or parole and 200 years imprisonment. *State v. Middleton*, 854 S.W.2d 504, 506 (Mo.App., W.D. 1993). The Missouri Court of Appeals affirmed the convictions and sentences and the denial of post-conviction relief on April 6, 1993. Id. at 504. The Court of Appeals denied a motion for rehearing and/or transfer to the Missouri Supreme Court on June 1, 1993. Id. The Missouri Supreme Court denied an application for transfer on June 29, 1993. On July 31, 1996 the petitioner filed a motion to recall the mandate challenging the effectiveness of appellate counsel in the Missouri Court of Appeals, Western District. This motion was denied on November 26, 1996.

The petitioner filed his initial petition for habeas corpus under 28 U.S.C. §2254 in the United States District Court for the Western District of Missouri on December 21, 1995. The petitioner filed a first amended petition on June 5, 1996 and a second amended petition on December 4, 1996.

The United States District Court for the Western District of Missouri denied the second amended petition for habeas corpus on April 29, 1998 denying all the claims as meritless or procedurally barred (Petitioner's Appendix at 2-44). On June 12, 1998 the District Court denied a Rule 59(e) motion challenging the standard of review used in analyzing the second amended petition (Id. at 46-49). The

District Court pointed out that not all the claims in the second amended petition related back to the original petition under the standard set out in Fed.R.Civ.P. 15(c)(2) and therefore the use of the post-Antiterrorism and Effective Death Penalty Act was appropriate on those claims and any event "all of petitioner's claims fail under both pre-AEDPA standards as well as post-AEDPA standards" (Id. at 46). The District Court denied a certificate of appealability.

The Eighth Circuit Court of Appeals after carefully reviewing the District Court file also denied a certificate of appealability (Id. at 1) and rehearing by the panel or en banc was denied without dissent (Id. at 51).

Reasons Denying the Writ

I. **This Court should not grant certiorari to determine whether the District Court erred in considering certain habeas claims under the post-AEDPA standard because the record indicates that all the petitioner's claims were found to fail under the pre-AEDPA standard as well as the post-AEDPA standard, and therefore a determination would merely be an advisory opinion.**

The petitioner contends he was denied the right to de novo review of his claims under the pre-Antiterrorism and Effective Death Penalty Act of 1996 standard even though his initial *pro se* petition was filed before April 24, 1996, the effective date of the act. Leaving aside that the petition ultimately denied was a second amended petition filed on December 24, 1996 over eight months after the effective date of the act, the claim is still unworthy of discretionary review.

The District Court found that "all of petitioner's claims fail under both pre-AEDPA standards as well as post-AEDPA standards" (Petitioner's Appendix at 46).

Because the petitioner has already received review under both pre-AEDPA and post-AEDPA standard with the same result, the question he asks concerning which standard should have been used is moot. The petitioner has already received the de novo review he seeks from this Court. The petitioner is in reality seeking an advisory opinion which cannot benefit him in his own case. Therefore certiorari should not issue on this question.

II. **This Court should not grant certiorari to review whether the petitioner was in custody when he made certain statements and performed certain acts because this is a very fact specific inquiry that presents no true conflict**

between decisions or question of general interest.

The petitioner alleges the District Court erred in finding that the record did not reflect that he was in custody or deprived of his freedom in any significant way when he made certain statements that were later used in evidence against him (Certiorari Petition at 15). The petitioner also alleges the District Court erred in its analysis in considering whether the circumstances indicated "a reasonable person would have felt that he was not at liberty to terminate the interrogation" as opposed to whether "a reasonable person would have felt that he was free to leave" (Certiorari Petition at 18). The petitioner alleges the District Court analysis conflicts with this Court's decision in *Thompson v. Koehane*, 516 U.S. 99, 112, 116 (1995), because it neglected to analyze whether a reasonable person would have felt free to leave as well as free to terminate the questioning (Petitioner's Appendix at 18).

This is factually incorrect. Explicitly relying on *Thompson v. Koehane* the District Court stated that the proper analysis was "would a reasonable person have felt he or she was not at liberty to terminate interrogation and leave" (Petitioner's Appendix 12). The District Court later cited analysis in which the Missouri Court of Appeals found that while admitted to the hospital; "all the evidence and inferences were that the defendant could have terminated the interview at any time and directed the officer to leave" (Petitioner's Appendix at 18).[1] The District Court concluded that, "The circumstances surrounding petitioner's interrogation do not establish that a reasonable person would have felt that he was not at liberty to terminate the interrogation"

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[1]When one is lying on hospital bed or ambulance stretcher for reasons independent of custody, the functional equivalent or leaving one's self, which is impractical, is being able to direct an officer to leave.

(Petitioner's Appendix at 18). Taking this sentence out of the context of the entire District Court decision, the petitioner has in reality set up the illusion of a conflict between *Thompson v. Koehane* and the District Court decision. No real conflict exists.

Insofar as the petitioner is asking this Court to disagree with the conclusion of the courts below that he was not in custody, he is presenting a very case specific and fact intensive question that is not of general interest beyond this case. This type of case specific inquiry is what the petitioner is actually seeking, and it is not an appropriate inquiry for certiorari review.

III. **This Court should not grant certiorari to review whether the District Court erred in finding certain claims to be procedurally barred because this claim presents no significant conflict with decisions of this Court or circuit courts of appeals and it presents no question of general interest, and all the claims were reviewed on the merits making the question of bar moot.**

The petitioner alleges the District Court erred in finding the claims considered in the District Court decision at pages 28 to 36 of the petitioner's appendix to be procedurally barred. The claims at pages 28-36 of the appendix are six claims of ineffective assistance of trial counsel (Petitioner's Appendix at 28-29); a claim that the prejudice from those six claims should have been considered cumulatively (Petitioner's Appendix at 30); eight complaints about closing argument (Petitioner's Appendix at 31-34); and a complaint that the prosecutor had a conflict of interest (Petitioner's Appendix at 34-36).

The ineffective assistance of trial counsel claims were found to be barred because the claims were not raised in a

motion for post-conviction review under Missouri Supreme Court Rule 29.15 or the appeal of the denial of that motion (Petitioner's Appendix at 29-30). The trial error claims were rejected as barred because these claims were not briefed on direct appeal (Petitioner's Appendix at 31-36). The petitioner's argument is that because he filed an unsuccessful motion to recall the mandate challenging the effectiveness of consolidated appellate counsel the underlying procedural bars are removed (Certiorari Petition at 20-21). This is a non sequitur. Leaving aside that ineffective assistance of post-conviction appellate counsel could not have provided cause to excuse,[2] (*Coleman v. Thompson*, 501 U.S. 722, 733 (1991)), the default of the ineffective assistance of trial counsel claims the unsuccessful allegation raised and rejected in state court that appellate counsel was ineffective for not raising a particular issue does not provide cause to excuse the default of the underlying issue. The state courts, contrary to the petitioner's assertion, have not ruled on the underlying claims that were found to be barred by the District Court and the factual premise of his argument is therefore incorrect. *See Nave v. Delo*, 62 F.3d 1024, 1031-1032 (8th Cir. 1995), *cert. denied*, 518 U.S. 1036 (1996).

Further, the petitioner asserts that but for erroneous procedural bar analysis the District Court "would have reached the merits" of his claims (Certiorari Petition at 23). The petitioner fails to note that the District Court did review the merits of each and every claim found to be procedurally barred at pages 28 through 36 of his Appendix and found each to be meritless as well as barred (Petitioner's Appendix at 28 through 36). The premise of the claim that the petitioner was wrongly denied merits review is factually

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[2]In Missouri the effectiveness of trial counsel is a post-conviction review issue. *See Lowe-Bey v. Groose*, 28 F.3d 816, 818-820 (8th Cir.), *cert. denied*, 516 U.S. 1061 (1994).

incorrect because the petitioner has received this review. Therefore because the petitioner has already received the review he seeks, the issue before this Court is moot.

IV. **This Court should not grant certiorari to review whether the court below erred in denying a certificate of appealability as opposed to denying a certificate of probable cause because the court below views the standards for granting these certificates in a case raised under 28 U.S.C. §2254 as identical and therefore the petitioner could have suffered no denying.**

The petitioner alleges the court below erred in denying a certificate of appealability in his case because he alleges his case should have been considered for a certificate of probable cause as opposed to a certificate of appealability. It is well established that in the context of a case raised under 28 U.S.C. §2254 the court below considers the standards of review for issuing a certificate of probable cause and for issuing a certificate of appealability to be identical. *See* *Ramsey v. Bowersox*, 149 F.3d 749, 759 (8th Cir. 1998), *cert. denied*, 119 S.Ct. 1083 (1999); *Tiedeman v. Benson*, 122 F.3d 518, 521 (8th Cir. 1997).

The court below did not find any issue worthy of a certificate of appealability (Petitioner's Appendix at 1). The petitioner therefore correctly does not argue that he was disadvantaged on the theory that the granting of certificates of probable cause was not issue specific, and one reviewable claim made all claims reviewable.[3] Rather, the petitioner alleges he was disadvantaged because the certificate of

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[3]Such an argument of disadvantage made in an appropriate case would fail because circuit courts of appeals could and did issue certificates of probable cause limited to specific issues under the old habeas statute. *See* *Ramsey v. Bowersox*, 149 F.3d *supra* at 759-760.

appealability provisions grant review only on constitutional claims as opposed to any federal claims and his procedurally barred claims therefore may have been considered necessarily unreviewable by the court below (Certiorari Petition at 29-30). This argument however ignores relevant Eighth Circuit precedent on this issue.

In *Nichols v. Bowersox*, 172 F.3d 1068, 1070-1071 n. 2 (8th Cir. 1999) (en banc), the Eighth Circuit Court of Appeals en banc pointed out that it does not consider the statute creating a certificate of appealability to preclude review of preliminary procedural issues which were the basis of the denial of a constitutional claim in a lower court.

The petitioner suffered no prejudice by being denied a certificate of appealability as opposed to a certificate of probable cause because the standard of review in his case was identical. Although theoretically the scope of appellant review might be narrower in a 28 U.S.C. §2255 case challenging a federal statutory violation as opposed to a constitutional violation that hypothetical is not relevant to the petitioner's case. Because he received what he would have received had a certificate of probable cause been denied, no substantive conflict exists with cases indicating a certificate of probable cause should be granted or denied on pre-AEDPA petitions.

Conclusion

The petition for certiorari should be denied.

Respectfully submitted,

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